90-1378

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

CITY OF ALBUQUERQUE, a Municipal Corporation; KEN SCHULTZ, Mayor of the City of Albuquerque, SAM BACA, Police Chief of the City of Albuquerque and THEIR AGENTS AND EMPLOYEES AND ALL OTHERS ACTING IN ACTIVE CONCERT OR COOPERATION WITH THEM,

Petitioners,

-vs-

JOSEPH N. RIGGS, III, ALICE HECTOR, PETER CUBRA, JAMES R. TOULOUSE, TOVA INDRITZ, RANDI McGINN, NANCY HOLLANDER, SIGMUND BLOOM, HANK FARRAH, JOE FINE, DORIE BUNTING, ALLEN COOPER, RICHARD MOORE, THE AMERICAN CIVIL LIBERTIES UNION OF NEW MEXICO, a New Mexico non-profit corporation, THE NEW MEXICO CHAPTER OF THE NATIONAL LAWYERS GUILD and ALL OTHERS SIMILARLY SITUATED WHO ARE REPRESENTED BY THE ABOVE-NAMED PERSONS,

Respondents.

Petition For A Writ Of Certiorari To the United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where the District Court allowed plaintiffs in a civil rights action to supplement their pleadings to show the existence of actual injury sufficient to create standing to maintain the action, and the plaintiffs were unable to show evidence of actual injury to support the allegations which had been made solely on the basis of information and belief, should the Court of Appeals have affirmed the District Court's dismissal of the complaint for lack of subject matter jurisdiction rather than remanding it for discovery related to the plaintiffs' standing?

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Respondents.

Petition For A Writ Of Certiorari To the United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Order denying reconsideration, Civ. No. 89-2006 (10th Cir., filed December 3, 1990), appears at Appendix A. The opinion of the Court of Appeals, reported at 916 F.2d 582 (10th Cir. 1990), appears at Appendix B. The memorandum opinion and order of the District Court for the District of New Mexico, Civ. No. 88-1141 SC (D. N.M., filed January 4, 1989), appear at Appendix C.

JURISDICTION

The Order of the United States Court of Appeals for the Tenth Circuit denying reconsideration was entered on December 3, 1990. This petition for certiorari was filed within ninety days after that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In late 1987, the City of Albuquerque retained the former Chief Justice of the New Mexico Supreme Court to audit the Albuquerque Police Department Intelligence Unit. The audit report found that certain files were maintained by the Unit which, while legally maintained,

appeared to have no discernible law enforcement function. A task force of prominent Albuquerque citizens, empowered by the City Council to investigate the findings of the audit and to recommend appropriate changes, established new guidelines for intelligence gathering and retention.

The task force recommended that a Review and Purge Team review all of the Intelligence Unit files and to purge and destroy all files not maintained in accordance with the task force's guidelines. The Review and Purge Team determined that 35 boxes of documents should be destroyed. The Chief Administrative Officer of the City of Albuquerque publicly ordered the documents' destruction.

Approximately six months following the purging of the documents, on the date scheduled for their destruction, the complaint in this action was filed. The complaint was filed pursuant to 42 U.S.C. § 1983 and invoked jurisdiction pursuant to 28 U.S.C. §§ 1331(a) and 1343.[1] The complaint sought to certify a class of persons who had been aggrieved by the Intelligence Unit's maintenance of the subject files, to enjoin all intelligence functions of the Albuquerque Police Department, to produce copies of all purged intelligence records to persons upon whom such records were maintained, and to destroy all of the Albuquerque Police Department's purged intelligence files.

The named plaintiffs claim to fall within three categories: 1) attorneys who represent "unpopular causes"; 2)

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[1] Because the allegations of the complaint are necessary to a complete understanding of this petition, a copy of the complaint is attached as Appendix D.

political "activists"; and 3) organizations purporting to represent civil rights advocates. The complaint listed eighteen categories of improper police practices, all of which were asserted solely on the basis of the plaintiffs' "information and belief." The complaint makes no allegations of any wrongful conduct on the basis of any plaintiff's personal knowledge.

The defendants moved to dismiss the complaint alleging a lack of subject matter jurisdiction pursuant to a motion governed by Rule 12(b)(1) of the Federal Rules of Civil Procedure. The United States District Court for the District of New Mexico allowed plaintiffs to supplement their complaint to provide evidence of standing. The evidence with which the plaintiffs supplemented their complaint was comprised of the former New Mexico Chief Justice's written and oral audit report to the Albuquerque City Council, materials related to non-parties, material not related to any allegation of wrongful conduct, and the final report of the Review and Purge Team. In their supplementation, the plaintiffs again failed to make any particularized showing of actual harm.

Following the plaintiffs' submission, the District Court dismissed the complaint and denied the plaintiffs any relief. The court stated that the plaintiffs' complaint rested on "attentuated legal logic of the thinnest sort." The court held that the complaint, as no more than a "statement of generalized suspicion," fell short of this Court's holding in *Laird v. Tatum*, 408 U.S. 1 (1972), that required either a claim of specific objective harm or a threat of specific future harm.

The United States Court of Appeals for the Tenth Circuit reversed. Its opinion held that the complaint survived a motion to dismiss because the plaintiffs had made general allegations that they were the target of alleged ongoing investigations. The Tenth Circuit found the plaintiffs' allegations of harm "including but not limited to injury to personal, political and professional reputation . . . " to be sufficient to confer standing. In so holding, the Circuit Court looked only to the face of the complaint. Its opinion ignored the fact that the entirety of plaintiffs' allegations of wrongful conduct was made solely on the basis of information and belief. It further failed to recognize that the plaintiffs had failed to adequately supplement their complaint with either evidence or allegations made on the basis of personal knowledge after having been given an opportunity to do so. The Circuit Court then directed that on remand sufficient discovery be permitted to determine if the plaintiffs could establish any set of facts that would supply a basis for the allegations in the complaint.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Tenth Circuit contravenes standing decisions of this Court and conflicts with that of other circuits and permits substantive jurisdictional prerequisites to be subverted into mere incantations of unsupported pleading.

A. The Decision of the United States Court of Appeals for the Tenth Circuit Directly Conflicts with Decisions of This Court Requiring Particularized Allegations of Fact to Support Standing.

In *Warth v. Seldin*, 422 U.S. 490, 501 (1975), this Court recognized that in considering a motion pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, a trial court can "require the plaintiff to supply, by amendments to the complaint or by affidavits, further particularized allegations of fact claimed supportive of Plaintiff's standing." *Warth* held that after the plaintiffs are given this opportunity that if the plaintiffs' standing does not appear from all the materials in the record, the complaint must be dismissed.

The District Court provided the plaintiffs in this case precisely the opportunity to supplement their pleadings that was mandated by this Court in *Warth*. The District Court allowed the plaintiffs to supplement their complaint with any factual support they could muster for their claim. The District Court then carefully reviewed the material submitted by the plaintiffs in conjunction with the allegations made in the complaint, and found it to be totally lacking. The District Court then followed this Court's holding in *Warth* and dismissed the case for lack of subject matter jurisdiction.

The United States Court of Appeals for the Tenth Circuit completely ignored the governing *Warth* decision. The Circuit Court failed to recognize that the District Court allowed the plaintiffs to supplement their pleadings in order to demonstrate standing. Rather, the Circuit

Court held that the plaintiffs' bald, unsupported allegations of injury were sufficient to allow discovery to determine if the plaintiffs could then create standing. In so holding, the Circuit Court permitted discovery to establish standing after the District Court had already found itself deprived of subject matter jurisdiction.

This Court has recognized the importance of establishing standing before discovery is allowed to proceed. In *Laird v. Tatum*, 408 U.S. 1 (1972), this Court required the plaintiff to make a particularized showing of actual harm before allowing the plaintiff discovery into the operation of governmental agencies. The *Tatum* court refused to condone a "broad-scale investigation, conducted by . . . private parties armed with the subpoena power of a federal district court and the power of cross-examination to probe into . . . intelligence gathering activities . . ." *Id.* at 14. The plaintiffs in this case have no greater actual knowledge of official misconduct than did the plaintiff in *Tatum*. These plaintiffs have, however, drafted their complaint wary of the pitfalls encountered by the plaintiff in *Tatum*. Artful pleading, predicated solely upon information and belief, should not be allowed to substitute for pleading facts to support subject matter jurisdiction.

B. The Decision of the United States Court of Appeals for the Tenth Circuit is in Direct Conflict with Decisions of Other Circuit Courts of Appeals.

The decision of the United States Court of Appeals for the Tenth Circuit in this case directly conflicts with decisions of other circuit courts of appeals in two major respects. Considered either separately or combined, those

conflicts justify this Court granting certiorari for their resolution.

The first conflict between the Circuit Courts of Appeals results from the Tenth Circuit's holding that a district court that has found itself deprived of subject matter jurisdiction after reviewing both pleadings and supplementary information must still permit discovery to continue in order to permit the plaintiffs the opportunity to achieve standing. In *Haase v. Sessions*, 835 F.2d 902, 908 (D.C. Cir. 1987), the United States Court of Appeals for the District of Columbia Circuit held that the plaintiff has no right to discovery in opposing a motion to dismiss for lack of subject matter jurisdiction. The Tenth Circuit Court's opinion, therefore, is in direct conflict with opinions both of this Court and with that of the District of Columbia Circuit. *See Warth v. Seldin, supra; Haase v. Sessions, supra*. Failure to resolve this important conflict could vitiate established law relating to standing and to subject matter jurisdiction.

The second conflict between the Circuit Courts of Appeals relates to the allegations made in the plaintiffs' complaint. The District Court in this case characterized the complaint as "no more than a statement of generalized suspicion of existence of activity which raises the generalized suspicion that some subjective unspecific 'chill' might possibly attend some unspecified claimant . . . " *Riggs v. City of Albuquerque*, No. CIV-88-1141 SC, slip op. at 9 (D. N.M. Jan. 4, 1989). The United States Court of Appeals for the Tenth Circuit rejected the District Court's considered holding, and directed discovery to proceed. Conversely, on nearly identical allegations, the United States Court of Appeals for the District of

Columbia Circuit has found that generalized allegations of "governmental surveillance, infiltration and disruption" were "too generalized and nonspecific to support a complaint," and upheld the complaint's dismissal for lack of standing. *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1380, 1380 n. 2 (D.C. Cir. 1984). Other circuits have similarly required the pleading of specific wrongful actions and specific injury. *See Sinclair v. Schriber*, 916 F.2d 1109, 1115 (6th Cir. 1990); *Wade v. Goodwin*, 843 F.2d 1150, 1152 (8th Cir. 1988), *cert. denied*, 488 U.S. 854 (1988); *Haase v. Sessions*, 835 F.2d 902, 908-10 (D.C. Cir. 1987); *Olagues v. Russoniello*, 797 F.2d 1511, 1517-18 (9th Cir. 1986), *cert. granted*, 481 U.S. 1012 (1987) *vacated as moot*, 484 U.S. 806 (1987); *Fifth Avenue Peace Parade Committee v. Gray*, 480 F.2d 326, 332-33 (2nd Cir. 1973), *cert. denied*, 415 U.S. 948 (1974). The Tenth Circuit stands alone in permitting a complaint with only the most vague of allegations to survive a challenge for lack of standing.

The conflicts between the United States Court of Appeals for the Tenth Circuit and other circuits justify granting this writ of certiorari. Public policy concerns militate similarly. The complaint at issue in this case is a textbook example on how vague and unsupported allegations can permit intrusive discovery into the operations of a police agency. A district court must have the authority to determine if subject matter jurisdiction exists before permitting such discovery to begin.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOE RIGGS; ALICE HECTOR; PETER CUBRA; JAMES R. TOULOUSE; TOVA INDRITZ; RANDI MCGINN; NANCY HOLLANDER; SIGMUND BLOOM; HANK FARRAH; JOE FINE; DORIE BUNTING; ALLEN COOPER; RICHARD MOORE; AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO, INC., The American Civil Liberties Union of New Mexico,; THE NEW MEXICO CHAPTER OF THE NATIONAL LAWYERS GUILD, and all others similarly situated who are represented by the above named persons,	)	No. 89-2006
Plaintiffs-Appellants,	)	
v.	)	
THE CITY OF ALBUQUERQUE; KEN SCHULTZ; SAM BACA,	)	
Defendants-Appellees.	)	

ORDER

Filed December 3, 1990

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges.

This matters comes on for consideration of appellees' petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all the judges of the court in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

APPENDIX B

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JOSEPH N. RIGGS, III, ALICE HECTOR, PETER CUBRA, JAMES R. TOULOUSE, TOVA INDRITZ, RANDI McGINN, NANCY HOLLANDER, SIGMUND BLOOM, HANK FARRAH, JOE FINE, DORIE BUNTING, ALLEN COOPER, RICHARD MOORE, THE AMERICAN CIVIL LIBERTIES UNION OF NEW MEXICO, a New Mexico non-profit corporation, THE NEW MEXICO CHAPTER OF THE NATIONAL LAWYERS GUILD, and ALL OTHERS SIMILARLY SITUATED WHO ARE REPRESENTED BY THE ABOVE NAMED PERSONS,

Plaintiffs/Appellants,

v.

CITY OF ALBUQUERQUE, a Municipal Corporation; KEN SCHULTZ, Mayor of the City of Albuquerque, SAM BACA, Police Chief of the City of Albuquerque, and THEIR AGENTS AND EMPLOYEES AND ALL OTHERS ACTING IN ACTIVE CONCERT OR COOPERATION WITH THEM.

Defendants/Appellees.

No. 89-2006

Filed
Oct 12 1990

Appeal from the United States District
Court for the District of New Mexico
(D.C. No. CIV 88-1141SC)

Philip B. Davis, American Civil Liberties Union of New Mexico, Albuquerque, New Mexico (Ray Twohig, Albuquerque, New Mexico, on the brief) for Plaintiffs/Appellants.

Bruce Thompson, Civerolo, Hansen & Wolf, Albuquerque, New Mexico (Paula Forney, Assistant City Attorney, Albuquerque, New Mexico, Richard C. Civerolo, Ellen M. Kelly, Civerolo, Hansen & Wolf, Albuquerque, New Mexico, on the brief) for Defendants/Appellees.

Before HOLLOWAY, Chief Judge, ANDERSON, and EBEL, Circuit Judges.

EBEL, Circuit Judge.

Plaintiffs appeal from the district court's January 4, 1989 order dismissing this civil rights class action. Plaintiffs allege that the Albuquerque Police Department conducted certain investigations of their activities in violation of their constitutional rights, and they seek declaratory and injunctive relief. Relying on *Laird v. Tatum*, 408 U.S. 1 (1972), the district court dismissed the

suit on the pleadings for lack of standing. Because we conclude that plaintiffs have made sufficient allegations in their complaint to survive defendants' motion to dismiss, we reverse.

FACTS

During a mayoral campaign, allegations that the Intelligence Unit of the Albuquerque Police Department kept investigative files on controversial figures were made public. An audit of the Intelligence Unit's files by independent counsel, William Riordan, was ordered. After completing the audit, Riordan found that some files did not appear to have a proper police purpose. Plaintiffs allege that Riordan also found that information in the files had at times been released to the news media and that the police had not cooperated during the audit.

A task force was formed to recommend to the Albuquerque City Council how to resolve the problems surrounding the existence of the files. After an expert reviewed the files for the task force, the task force recommended that the files be purged and that new guidelines be placed on the Intelligence Unit. The task force issued a final report on March 17, 1988, ordering that all improper files be destroyed not more than six months from the date of the report. A team was formed to review the records and to determine what should be purged. The Administrative Officer of the City of Albuquerque ordered the purged documents be destroyed on September 21, 1988.

On September 21, 1988, plaintiffs initiated a class action for declaratory and injunctive relief and requested an ex parte temporary restraining order prohibiting the

destruction of the investigative files at issue in the case. Plaintiffs are lawyers, political activists, and politically active organizations who, it was alleged, have often taken controversial and unpopular positions. Because of the positions they have taken, they allegedly have been and are targets of unconstitutional surveillance by the Albuquerque Police Department and subjects of unconstitutionally developed and maintained files. Plaintiffs alleged that this surveillance and the maintenance of such files caused a chilling effect on their First Amendment rights, the effect of which goes beyond subjective fear to include injury to their personal, political, and professional reputations.

A TRO was granted to prevent the destruction of the files at issue. On January 4, 1989, upon a motion filed by defendants and after a hearing, the district court dismissed the action for lack of standing and dissolved the previous TRO. Plaintiffs filed a motion for a stay pending appeal with the district court to prevent the destruction of the files. The court heard argument by telephone on January 6 and denied the stay. Plaintiffs informed the district court and defendants that they were going to seek a stay from the Tenth Circuit. Plaintiffs immediately filed a notice of appeal[1] and sought a stay from this court. A

---

[1] Plaintiffs' January 6 notice of appeal improperly used the term *et al.* in designating all but one of the plaintiffs-appellants. *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). On February 1, within the 30-day time limit prescribed by Fed. R. App. P. 4(a)(1), plaintiffs amended their notice of appeal and correctly listed all of the plaintiffs. Therefore we have jurisdiction to hear this appeal. *See Kowaleski v. Director, OWCP*, 879

(Continued on following page)

stay was granted by this court, but not before defendants had destroyed the majority of the files.[2] On February 8, 1989, this court issued an order preserving any undestroyed documents. Plaintiffs now appeal the district court's dismissal of their suit for lack of standing.

DISCUSSION

Standing is a question of law that is reviewed de novo. *See United States v. Leary*, 846 F.2d 592, 595 (10th Cir. 1988). When reviewing the dismissal of a case upon a motion to dismiss for lack of standing, we treat all material allegations in the complaint as true and construe the complaint in favor of the plaintiff.[3] *See Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988); *American Mining Congress v. Thomas*, 772 F.2d 640, 650 (10th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986).

(Continued from previous page)

F.2d 1173, 1175-76 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 1114 (1990); *see also Torres*, 487 U.S. at 317 ("Nor did petitioner seek leave to amend the notice of appeal within the time limits set by Rule 4.").

[2] The investigative files were found in thirty-five boxes. Thirty-four of those boxes were destroyed. Because of the existence of the thirty-fifth box that was not destroyed, the action is not moot. In addition, this matter is not moot because the complaint alleges ongoing surveillance, and that cause of action would survive even the physical destruction of all of the previously accumulated files.

[3] Because we do not need to go outside of plaintiffs' complaint to hold that plaintiffs have standing, the parties' attempts to supplement the record are unnecessary and their motions are denied.

To satisfy the standing requirement, plaintiffs must show that they "personally [have] suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (quotations and citations omitted). The pivotal issue in this case is whether plaintiffs have adequately alleged an injury in fact.

In *Laird v. Tatum*, 408 U.S. 1 (1972), the plaintiffs challenged the Army's surveillance of political activists because the fear that the information could be misused "chilled" plaintiffs' First Amendment rights. Plaintiffs did not allege any specific action of the Army directed against them nor any specific injury that they had suffered. Rather, they alleged only that the *existence* of the Army's intelligence gathering system had a generalized chilling effect on their activities. The Court held that this was not sufficient to allege standing, concluding that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird*, 408 U.S. at 13-14.

In *Meese v. Keene*, 481 U.S. 465 (1987), the Supreme Court elaborated upon *Laird* and emphasized that in order to have standing the plaintiff must show that defendant's actions caused a direct injury to the plaintiff that was both distinct and palpable. *Id.* at 472. In contrast to *Laird*, however, the Court in *Meese* held that *harm to a plaintiff's reputation* in the community *is* a cognizable injury which affords a plaintiff standing to bring suit. *Id.* at 473-74.

The plaintiff in *Meese*, Barry Keene, challenged the designation of films as political propaganda under the Foreign Agents Registration Act. Keene was a California State Senator who wanted to show three Canadian films that had been designated as political propaganda. Keene argued that because the films had been designated as political propaganda, he could not show the films without harming his reputation in the community and his chances of reelection to public office. The Court specifically noted that "[i]f Keene had merely alleged that the appellation deterred him by exercising a chilling effect on the exercise of his First Amendment rights, he would not have standing to seek its invalidation." *Id.* at 473. However, because he had established injury to his reputation in the community as a result of action that would be applied directly to him, the Court found that Keene had standing to bring suit.

Here, however, the district court erroneously construed plaintiffs' complaint as alleging only a general chilling of their rights because of a suspicion of the existence of improper police investigations. In plaintiffs' complaint they allege the following:

> 34. The persons and organizations subject of the above described focused action, including *plaintiffs* and the plaintiff class, *were so targeted . . . and . . . have been subjected to and harmed by a policy or practice* that systematically violates citizens' rights.
>
> 35. [The] APD intelligence units have engaged and presently continue to engage in all of the following activities [various surveillance activities described]
>
> . . . .

> 36. The conduct described above has been in many instances based on plaintiffs' innocent behavior *subjecting them to illegal surveillance activities*. . . . Defendants' actions and those of their agents have caused and continue to cause a chilling effect on plaintiffs' first amendment association and free expression rights, the effect of which causes harm to plaintiffs beyond subjective fear, *including but not limited to injury to personal, political and professional reputations*. . . .
>
> . . . .
>
> 41. Defendants . . . acted under color of law, . . . knowingly and purposely with the specific intent to deprive plaintiffs and members of the class of the above described constitutional rights. . . .
>
> 42. The above described actions and omissions of defendants and their agents are the direct and proximate causes of the injuries complained of by plaintiffs herein. . . .

R. Doc. 1 at ¶¶ 34-36 & 41-42 (emphasis added). Therefore, plaintiffs allege more than a chilling of their First Amendment rights; they also allege harm to their personal, political, and professional reputations in the community. More importantly, the plaintiffs in this case allege that they were the actual targets of the illegal investigations. Thus, *Laird* is easily distinguishable because there the plaintiffs alleged only that they experienced a generalized chilling effect by their mere knowledge of the existence of the Army's data-gathering system without alleging any specific Army action against them. *Laird*, 408 U.S. at 3, 9, 13.[4] *See Clark v. Library of Congress*, 750 F.2d

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[4] We need not, and do not, address whether injury to reputation alone, without the plaintiff being the subject of the action complained of, would be sufficient to allege standing.

89, 92-93 (D.C. Cir. 1984); *Ozonoff v. Berzak*, 744 F.2d 224, 229 (1st Cir. 1984); *cf. Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 522 (9th Cir. 1989).[5]

In addition, the complaint overcomes the concern expressed in *City of Los Angeles v. Lyons*, 461 U.S. 95, 102-03 (1983), and *O'Shea v. Littleton*, 414 U.S. 488, 495-97 (1974), that a plaintiff seeking prospective relief must show more than past harm or speculative future harm. The plaintiff in *Lyons* alleged that in the past he had been subject to an illegal chokehold by the police and that in the future, if stopped by the police, he could again be subjected to an illegal chokehold. However, the Court found that the allegation of past harm did not confer jurisdiction to seek prospective relief and the allegation of future harm was speculative in nature and did not present a present, live controversy for the Court to address. *Id.* at 104-05. The plaintiffs in *O'Shea* challenged an alleged pattern and practice of illegal administration of the Alexander County (Illinois) criminal justice system. The Court held that the plaintiffs did not have standing because it was mere speculation and conjecture that the plaintiffs would be arrested and again subjected to criminal proceedings. *O'Shea*, 414 U.S. at 497.

In contrast to the speculative future harm alleged in *Lyons* and *O'Shea*, plaintiffs in this case allege that

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[5] Because we have found that plaintiffs sufficiently alleged that they were the target of the illegal investigations, plaintiffs' argument that they should be granted standing because they are members of an identifiable group of persons vulnerable to the asserted illegal investigations need not be addressed. *See* Plaintiffs' Brief-in-Chief at 17-18.

defendants continue to conduct illegal surveillance of plaintiffs' activities. *See, e.g.*, R. Doc. 1 ¶¶ 28, 35, 37. Therefore, plaintiffs' cause of action should not have been dismissed for lack of standing because they have alleged a cognizable, continuing injury which presents a case or controversy for the court to consider.

Nothing in this opinion would preclude defendants from seeking a motion for summary judgment for lack of standing if plaintiffs are unable to establish a factual basis for their complaint after they have been afforded a fair opportunity to develop the facts. *See Hasse v. Sessions*, 835 F.2d 902, 906-07 (D.C. Cir. 1987). As noted previously, a ruling on a motion to dismiss for lack of standing requires the court to construe all material allegations of the complaint as true, and, although the court may require plaintiff to supply additional information, discovery is not required. *See Hasse*, 835 F.2d at 906-08. If plaintiffs adequately allege injury in their complaint, discovery would presumably occur as the case develops and could be ordered where parties have filed motions for summary judgment. *See Hasse*, 835 F.2d at 907 (citing *Wilderness Society v. Griles*, 824 F.2d 4, 17 (D.C. Cir. 1987)). Discovery is particularly appropriate in this case because plaintiffs do not have access to the investigative files which contain the details of the specific investigations conducted by the defendants.

The importance of permitting discovery when crucial information is in the exclusive control of the defendant was discussed in *Palmer v. Chicago*, 755 F.2d 560, 573 (7th Cir. 1985). In *Palmer*, plaintiffs, who had been convicted of felonies, challenged the nondisclosure of secret files which allegedly contained exculpatory information about

the plaintiffs. The Seventh Circuit, in determining that the plaintiffs had standing to seek a preliminary injunction to preserve such secret "street files," explained:

> The defendants cannot argue on one hand that the plaintiffs have failed to prove injury and, on the other hand, that the plaintiffs are not entitled to the very evidence that is essential in proving that injury. Given the unique situation presented in this case, where the plaintiffs' evidence is in the exclusive possession of the defendants, the subclass A plaintiffs, at best, can only allege injury resulting from the defendants' conduct. The plaintiffs must await production and review of the actual "street files" until they can introduce evidence to prove their allegations of harm. It is clear that the subclass A plaintiffs will have no meaningful opportunity to prove their allegations unless the existing "street files" are preserved and the plaintiffs are permitted access to those files.

Palmer, 755 F.2d at 573.

As in *Palmer*, the lack of access to the investigative files in this case prevented plaintiffs from alleging with more specificity that they were targets of the alleged illegal investigations. Dismissal prior to discovery would be inequitable under these facts because plaintiffs have alleged a direct harm caused by defendants' actions. Their suit should be heard unless, after they have had an opportunity to develop the facts, they cannot prove any set of facts that would supply a basis for the allegations in their complaint. If there is no factual basis for plaintiffs' allegations, there will be time enough later for the court to consider whether sanctions are warranted.

We REVERSE the district court's January 4, 1988 order dismissing this case for lack of standing and REMAND the case for further proceedings consistent with this opinion.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JOSEPH N. RIGGS, III, et al.,

Plaintiffs,

vs.

CITY OF ALBUQUERQUE, et al.,

Defendants.

No. CIV-88-1141 SC
(Filed Jan. 4, 1989)

MEMORANDUM OPINION

The Court has considered defendants' Motion to Dismiss filed September 29, 1988 and the concomitant request that the Temporary Restraining Order issued September 21, 1988 be dissolved.

For the reasons hereafter stated, defendants' Motion to Dismiss will be granted and the Temporary Restraining Order issued September 21, 1988 will be dissolved.

THE PARTIES

The plaintiffs are thirteen individuals, the American Civil Liberties Union and the New Mexico Chapter of the National Lawyers Guild. The latter two describe themselves in paragraphs 21 and 22 of the complaint. Ten of the plaintiffs are lawyers who, in general, claim that they have engaged in either defense of persons accused of crimes or the prosecution of civil rights litigation, some of which has involved police abuse by the Albuquerque Police Department (¶¶ 5 through 16, Complaint). They

claim they have earned reputations "as zealous and aggressive advocates for those involved in unpopular causes" and that they have "gained reputations as being vigilant defenders and protectors" of their clients' rights (¶ 17, Complaint). The other three individual plaintiffs describe themselves as "activists" in political, human rights, peace and community categories (¶¶ 18, 19 & 20, Complaint). In general, the plaintiffs portray themselves as a group which, in the past, arrayed itself vigorously against members of the Albuquerque Police Department. They state they bring this case for themselves and as a class action on their own behalf and on behalf of others similarly situated. The plaintiffs say that they and the class they would represent are persons and organizations who are, or may be in the future, the subject of alleged unlawful surveillance activities by the Albuquerque Police Department.

THE COMPLAINT

The complaint purports a civil rights class action under the First, Fourth, Sixth, Ninth and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983. It seeks declaratory and injunctive relief.

This Court is requested to issue its declaration that the Intelligence Unit of the City of Albuquerque Police Department ("APD") and all "emanations from and permitations [sic] of such" unit should be permanently eradicated and that a broad range of allegedly "illegal and unconstitutional" police activity be enjoined. The alleged police activity against which plaintiffs thrust and which they contend offends the United States Constitution can

generally be described as investigation of individuals and the maintenance of information generated by such alleged investigations. The investigative activity and information retention which plaintiffs purport to identify, it is claimed, is prohibited by the United States Constitution. The complaint describes this activity as "investigation of politically related activities in the absence of a legitimate basis for law enforcement related background or surveillance activities."

THE FILES

An appendage in this case, if not in fact the ultimate prize sought by plaintiffs in this litigation, is a group of investigative files which have now been ordered destroyed by officials of the City of Albuquerque. There is ongoing a struggle by the parties on the question as to whether the files should now be destroyed or whether, before destruction, plaintiffs should be afforded examination of these. The issue arises from the following occurrences. Months ago the Mayor of the City appointed independent counsel to perform an "audit" of the Intelligence Unit of the APD. A prominent lawyer and former justice of the Supreme Court of New Mexico, William Riordan, serving as independent counsel, performed the "audit." In oral and written reports to the City Council he stated that information, some generated by investigative activity of APD or otherwise received by it, was maintained in investigative files and that such information did not appear to him to be related to proper police purpose.

The audit inspired creation of a citizen task force to deal with matters in the Intelligence Unit or, as the Mayor

of the City announced on March 17, 1988, to "clean up the Intelligence Unit of the Albuquerque Police Department." The charge or charter to the Citizen Task Force was "1) to secure the existing intelligence files; 2) to oversee a review and purge process of those files; and 3) to make such recommendations regarding intelligence policy and organizational structure as the task force might ultimately deem appropriate." (Plaintiffs' Exhibit 1 to Memorandum in Support of Application for Temporary Restraining Order.)

The task force, a group of prominent citizens, appointed a Review and Purge Team consisting of seven departmental personnel, six APD officers and one civilian to review APD files. These seven, according to the Final Report of the Review and Purge Team, received training "pertaining to the criteria for retaining intelligence information or reports" and thereafter undertook review of 2286 files. Of these, 924 survived the purge and the balance, 1362, presumably are those which have been segregated for destruction. The Task Force recommended destruction of purged files "in no event . . . past 6 months from acceptance by the Task Force chairman from the Review and Purge Team's final report." The acceptance date was May 11, 1988. Thus, this destruction was mandated "in no event" later than November 11, 1988, absent a court ordering otherwise. In response to plaintiffs' application for a temporary restraining order filed September 21, 1988 this Court ordered that the files slated for destruction be preserved. These files are now in possession of the United States Marshal pursuant to the order of this Court.

The basic issue which immediately and prominently surfaces is that of the "standing" of the plaintiffs to bring this action. It is this Court's view that *Laird v. Tatum*, 408 U.S. 1 (1972) is dispositive on the issue. The United States Supreme Court has instructed that "the federal courts established pursuant to Article III of the Constitution do not render advisory opinions." *Laird, supra*, at 14, citing *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). And the core principle expounded in *Laird* is that claims of subjective "chills" on the exercise of constitutional rights "are not adequate substitute for a claim of specific objective harm or a threat of specific future harm." *Laird, supra* at 14.

Quoting from *Ex Parte Levitt*, 302 U. S. 663, 634 (1937), the Court reiterated the "established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action. . . . "

The claims of the plaintiffs in *Laird* and those made by the plaintiffs in this case travel in remarkably similar if not identical tracks. In *Laird*, as here, the issue to be addressed is "whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose."

The essence of plaintiffs' claims in *Laird* was that the Army intelligence gathering system and activity exceeded the mission requirements of the Army and thereby existence of the system "chilled" exercise of plaintiffs' constitutional rights. The system it was claimed there, as the claim is made here, placed "lawful civilian political activity" under surveillance and thus unconstitutional "chill" resulted.

Significantly, in *Laird* no discussion addressed the issue as to whether specific activity of particular plaintiffs were, in fact, the intelligence which was captured by the system. It appears this was assumed. But in the case before this Court there is conspicuous absence of allegation that a specific plaintiff was the subject of any specific APD investigative activity which resulted in a "specific present objective harm or threats of specific future harm" to that plaintiff. To be sure much "information and belief" is loosely bandied about in the complaint (see, for example, paragraph 35). But these generalizations are rendered absolutely meaningless and nugatory by plaintiffs' own admission that because of APD "secrecy" they, plaintiffs, are ignorant and unaware of "the specific nature and scope of illegal and unconstitutional activities of the APD." (See paragraph 26, defendants mistakenly designated plaintiff.)

A plaintiff who would pursue a claim against a defendant must state and identify the factual basis which supports standing. How, factually, has a particular act of a particular defendant caused a particular damage to a particular plaintiff? This exposition is, quite simply, one which must always be made by a claimant. And this is a vital requisite whether a party sues to vindicate a right

personal to him or her or whether, as in this case, one or more plaintiffs seek to represent a class of persons not yet certified as formal class litigants.

The logic plaintiffs' allegations press to establish standing is, while imaginative, faulted. Their starting premise s self-description wherein they cast themselves in molds from whence emerge figures which, they contend, inevitably and surely draw the certain antipathy of APD. The personal scenario thus established and an auditor having concluded, although not specifically having described the factual basis for his conclusions, that some of the investigative files may not have related to what he conceived to be proper police function, ergo:

(1) the plaintiffs were as a certainty targets of improper police surveillance or other investigative function, and

(2) this unspecific police activity, yet undetermined as to which specific plaintiff it relates, "chills" the exercise of constitutional rights of that as yet unidentified plaintiff.

The factual syllogistic chain by which plaintiffs suggest standing is gossamer. It does not hold. It does not stand against defendants' motion.

Laird teaches that the effect which arises from knowledge that a governmental agency is engaged in investigative activity "or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that individual" does not give rise to the specie of "chill" prohibited by the Constitution.

Plaintiffs suggest an unusual and curious reasoning to establish the proposition that somehow a "chill" is cast on their exercise of rights under the Constitution. Reduced to essence the chain is sought to be forged on interlock of the following links: We are persons who, we say, engage in activity which, we say, inspires APD hostility. This hostility, we say, inspires APD surveillance which surveillance, if known to others, marks us as persons whom these others might suspect of wrongdoing. Therefore, these possible suspicions by others "chills" our exercise of constitutional right. The stigma, and thus the consequent claim of "chill," is one which complainants themselves would create. The stigma, should one be moved by conjecture to believe exists, is self-generated. No one, other than plaintiffs themselves, so far as has been made known to this Court, has sought to identify any of the plaintiffs as persons investigated by APD.

Plaintiffs' attempt to show standing and their attempt to gain access to the purged files rest on attenuated legal logic of the thinnest sort. The term legal bootstrapping can fairly be used to describe the efforts. And legal bootstrapping will not avail plaintiffs in this case in this Court.

A pleading which can fairly be characterized as no more than a statement of generalized suspicion of existence of activity which raises the generalized suspicion that some subjective unspecific "chill" might possibly attend some unspecified claimant is not the pleading which comports to the requirements of *Laird* and other authorities on standing. It is not a pleading which alleges "specific present objective harm or a threat of specific future harm."

The Court therefore concludes that the Complaint of plaintiffs:

(1) does not contain sufficient allegations to establish standing of the plaintiffs to prosecute the case, nor

(2) does it state a claim or claims for relief upon which relief can be granted.

Orders will thus be entered dismissing the complaint and dissolving the restraining order issued by this Court on September 21, 1988 relating to the purged files of APD as well as this Court's order of October 6, 1988 which, also, relates to custody of the files. The latter relates to custody of 35 containers of files, 34 of which were subject to a directive ordering destruction and the 35th of which containers, as the Court is informed, contains files relating to another pending case. The 35 containers were placed in the custody of the United States Marshal on September 22, 1988. All containers shall immediately be returned by the Marshal to a person designated in writing by defendants' counsel to receive such files in their containers. Counsel for defendants should, of course, make appropriate arrangements for custody of the 35th container, i.e., the files in the container which has not been designated for destruction.

/s/ Santiago E. Campos
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JOSEPH N. RIGGS, III,
et al.,

Plaintiffs,

vs.

CITY OF ALBUQUERQUE,
et al.,

Defendants.

No. CIV-88-1141 SC
(Filed Jan. 4, 1989)

ORDER OF DISMISSAL

In accord with the Memorandum Opinion of this Court filed today,

IT IS ORDERED that the Complaint filed herein by plaintiffs should be, and hereby is, DISMISSED.

/s/ Santiago E. Campos
CHIEF JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JOSEPH N. RIGGS, III, ALICE HECTOR, PETER CUBRA, JAMES R. TOULOUSE, TOVA INDRITZ, RANDI McGINN, NANCY HOLLANDER, SIGMUND BLOOM, HANK FARRAH, JOE FINE, DORIE BUNTING, ALLEN COOPER, RICHARD MOORE, THE AMERICAN CIVIL LIBERTIES UNION OF NEW MEXICO, a New Mexico non-profit corporation, THE NEW MEXICO CHAPTER OF THE NATIONAL LAWYERS GUILD, and ALL OTHERS SIMILARLY SITUATED WHO ARE REPRESENTED BY THE ABOVE NAMED PERSONS,

Plaintiffs, No. CIV88-1141SC

vs.

CITY OF ALBUQUERQUE, a Municipal Corporation; KEN SCHULTZ, Mayor of the City of Albuquerque, SAM BACA, Police Chief of the City of Albuquerque, and THEIR AGENTS AND EMPLOYEES AND ALL OTHERS ACTING IN ACTIVE CONCERT OR COOPERATION WITH THEM,

Defendants.

COMPLAINT
FOR
DECLARATORY AND INJUNCTIVE RELIEF
FOR CIVIL RIGHTS VIOLATIONS

Plaintiffs, by their counsel, below listed, bring this Complaint for civil rights violations:

1. This is a civil rights class action suit for declaratory and injunctive relief arising under the first, fourth, sixth, ninth and fourteenth amendments to the United States Constitution and 42 U.S.C. §§ 1983. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331(a) and

1343. The matter in controversy exclusive of costs and interest exceeds the sum of $10,000.00.

2. This suit seeks to declare the existence and operation of the City of Albuquerque Police Department (APD) "Intelligence Unit" and all emanations from and permutations of such unit (hereinafter "subversive units") illegal and unconstitutional; to enjoin its continued existence and operation; and to enjoin a wide range of illegal and unconstitutional police activity, including but not limited to 1) the investigations of persons considered by APD to be politically threatening or whose protected first amendment free speech and association activities have made or make them the targets of such illegal and concerted police investigative activity, 2) the maintenance, dissemination or use of information in files and dossiers or on cards maintained by the APD on hundreds of individuals and organizations, the number of whom is unknown because of the secrecy in which APD intelligence units operate and engage in such illegal and unconstitutional activity, 3) the improper use of various investigative techniques, including informants, undercover agents, surreptitious entry, electronic surveillance, and others, and 4) such other relief as justice may require and this Court deems appropriate and necessary to completely terminate the illegal and unconstitutional activities of these units, now and in the future, and to take whatever steps otherwise possible, necessary and appropriate to correct defendants' past illegal and unconstitutional activities.

3. As used in this Complaint, the terms "investigation" and "file" are meant to have the most all-inclusive possible meaning as follows:

File: Any physical manifestation of information obtained as a result of an investigation, or otherwise, concerning any individual or organization, regardless of the terminology used by defendants to distinguish among varying materials, and regardless of the administrative or technical systems by which such information is obtained, maintained, stored, disseminated, used or retrieved.

Investigation: Any action or activity whatsoever which results in any type of information being obtained or maintained by defendants regardless of the terminology used by defendants to designate the "action/activity" or the "information," and regardless of the source from which the information comes.

4. At all times material hereto, plaintiffs Joseph N. Riggs, III, Alice Hector, Peter Cubra, James R. Toulouse, Tova Indritz, Randi McGinn, Nancy Hollander, Sigmund Bloom, Hank Farrah, Joe Fine, Dorie Bunting, Allen Cooper and Richard Moore were citizens of the United States of America and residents of Bernalillo County, New Mexico.

5. Plaintiffs Riggs, Hector, Cubra, Toulouse, Indritz, McGinn, Hollander, Bloom, Farrah and Fine are attorneys licensed to practice law in the State of New Mexico and in the federal courts of the District of New Mexico.

6. Plaintiff Riggs, former District Public Defender, is a criminal defense attorney whose practice is primarily involved in the representation of persons accused of serious crimes. He has represented notorious criminal defendants subject to the death penalty such as William Wayne Gilbert and Michael Guzman. He also participated

in the representation of Van Robinson in his successful civil rights suit against the City.

7. Plaintiff Hector, a former public defender, is an attorney in private practice who represents criminal defendants and who has prosecuted civil rights litigation against APD based on sexually discriminatory employment practices and police brutality.

8. Plaintiff Cubra is a criminal defense attorney and public civil rights litigation specialist. He represented Joel Compton, charged with the killing of a police officer, and was involved in investigation in support of attorney John Walker's civil rights lawsuit against the APD. He is a member of the National Lawyers Guild and has been legal advisor and attorney for numerous peace activists.

10. Plaintiff Toulouse, throughout his long legal career, has taken on unpopular causes including the defense of persons accused of serious crimes and the *Van Robinson* civil rights case in which he obtained judgment against the City of Albuquerque for APD's actions in framing Robinson for the killing of police officer Phil Chacon. The first recipient of the New Mexico State Bar Association Award for Courageous Advocacy, he has repeatedly demonstrated his commitment to civil rights causes and has been a consistent vocal opponent of police abuses within APD.

11. Plaintiff Indritz has been a criminal defense lawyer since 1975, and practices exclusively criminal law in the federal courts.

12. Plaintiff McGinn, a former assistant district attorney, represents persons accused of crime and has

been involved in numerous civil rights cases arising from police misconduct by APD officers.

13. Plaintiff Nancy Hollander is a criminal defense attorney and an officer of the National Association of Criminal Defense Lawyers. She is former Executive Director of the ACLU of New Mexico and a longtime political activist. Information obtained under the Freedom of Information Act indicates she was the subject of political surveillance by the FBI and was actively surveilled while in Albuquerque in the 1970's during a political speaking engagement.

14. Plaintiff Bloom is a criminal defense attorney who has filed a number of civil rights cases against APD officers alleging police brutality and other forms of misconduct.

15. Plaintiff Farrah is a criminal defense attorney who has repeatedly been involved in legal battles with APD, attacking the credibility of APD officers and seeking to suppress evidence and statements obtained by APD in violation of the constitutional rights of his clients.

16. Plaintiff Fine has engaged in the defense of persons accused of serious criminal offenses, including murder, based on the investigation and testimony of APD officers.

17. Plaintiff attorneys have earned reputations as zealous and aggressive advocates for those involved in unpopular causes including persons accused of criminal conduct and/or who have been the victims of police misconduct seeking vindication of their civil rights. In addition, these plaintiffs have spoken out publicly about

the rights of citizens including those accused of crimes, and about police abuses. They have gained reputations as being vigilant defenders and protectors of their clients' interests.

18. Plaintiff Dorie Bunting has been an outspoken political activist in Albuquerque since the early 1960's in pro-peace and anti-nuclear efforts. During the Vietnam War era, she was a member of the War Resisters' League and engaged in demonstrations, leafleting and vigils for peace. A member of Citizens Against Nuclear Threats, she actively and vocally opposed the WIPP project and nuclear weapons and energy development. She helped to found the Peace Center in 1983, is a member of the New Mexico Peace Conversion Project, has been involved in war tax resistance and has opposed American intervention in Central America.

19. Plaintiff Allen Cooper is a locally based human rights and peace activist whose movements inside and outside the United States have been monitored by federal intelligence agencies, in collaboration and communication with the Albuquerque Police Department, since the 1960's when he was involved in anti-war organizing and actively related to, a member of or a leader of various activist groups including Students for a Democratic Society (SDS), the Student Organizing Committee (SOC), the Black Student Union (BSU), the United Mexican American Students (UMAS), the Black Berets, the Brown Berets and the Peace and Freedom Party. Cooper was the subject of local and federal surveillance as a result of his support and participation in the occupation of Wounded Knee in South Dakota. His residence was also subject to surveillance and "trashing" at approximately the same time that

APD engaged in such activities with regard to attorney John Walker. At that time Cooper was employed as an investigator by Walker, who was the subject of defendant Maruffi's unlawful activities in retaliation for Walker's representation of Reggie Walker in a civil rights action filed against APD officers including Maruffi.

20. Plaintiff Richard Moore is a long time community activist and outspoken community leader who has publicly advocated against police abuses and other violations of the constitutional freedoms of individuals and particularly minorities. He was formerly a local leader of the Black Berets and the Chicano Communication Center and was active in the investigation and exposure of police brutality in Albuquerque. He is presently director of the Southwest Organizing Project, a community based multi-issue organization emphasizing and supporting community development and environmental issues with emphasis on their impact on the minority community.

21. Plaintiff The American Civil Liberties Union of New Mexico is a New Mexico non-profit corporation dedicated, organized and actively involved through litigation, legislative lobbying and educational efforts in the protection and preservation of constitutional guarantees and civil liberties to which all citizens are entitled. The Union, through its members, has been and continues to be outspoken in its defense of civil liberties and its attack on those who deny others such fundamental freedoms.

22. Plaintiff New Mexico Chapter of the National Lawyers Guild is a chapter of the National Lawyers Guild, a politically progressive organization of attorneys, legal and paralegal workers and jailhouse lawyers who

for fifty years or more have been in the forefront of organizing and advocating the struggles of oppressed peoples, fighting for their human rights and seeking justice through the Courts by upholding and enforcing the United States Constitution and the Bill of Rights. Information obtained through the Freedom of Information Act has demonstrated a continuing long term surveillance of the Guild and its members by various local and federal police agencies.

23. Defendant City of Albuquerque (City) is a municipal corporation duly organized under the laws of the State of New Mexico and responsible for the operation of the Albuquerque Police Department (APD) and for claims against it.

24. Defendant Ken Schultz is the duly elected Mayor of the City of Albuquerque and as such, acting as agent for defendant City of Albuquerque is responsible for the operations and activities of APD.

25. Defendant Sam Baca is the APD Chief of Police, and, acting as agent for defendant City of Albuquerque, has direct and final decisionmaking authority and supervision within APD.

26. Although the specific nature and scope of illegal and unconstitutional activities of the APD intelligence units are unknown because of the secrecy under which plaintiff operates, on information and belief, the material acts or omissions to act, or some of them, complained of herein occurred in Bernalillo County, New Mexico.

27. Pursuant to Fed.R.Civ.P. 23(a) and (b)(2) and (3), plaintiffs bring this action as a class action on their behalf

and on behalf of all others similarly situated, which include New Mexico residents, individual and organizational, and others while within the State of New Mexico as follows:

A. All those persons and organizations who have been, or are or may be in the future, the subject of unlawful surveillance activities by the APD including but not limited to investigations of persons' or organizations' political beliefs, opinions or associations, or for other non-criminal activities as yet undiscovered, by various as yet unknown forms of surveillance engaged in by unknown past and present APD law enforcement officers undertaken for reasons outside the scope of legitimate law enforcement activities and in the absence of reasonable suspicion or probable cause to believe such persons or organizations at the time of such surveillance were engaged in, were about to engage in or had threatened to engage in criminal activity.

B. The members of this class are often also identifiable by the following criteria, in addition to others unknown to plaintiffs because of the secrecy in which APD intelligence units operate:

(1) The investigation of class members is noted, reflected or in some other way indicated in files maintained, used or disseminated by the named defendants and their agents or by some other governmental agency working with them, or both.

(2) The investigation of class members was, is, or will be undertaken primarily

because of the political, economic, religious, social or other unpopular or critical views expressed by members of the class, or because of the association of members of the class with an individual or organization deemed "subversive" by defendants and their agents.

(3) The investigation of class members was, is, or will be undertaken and primarily directed toward lawful, peaceful and constitutionality protected expression and activity, and not toward criminal conduct.

C. As to the class of persons on whose behalf this action is brought, the class is so numerous that joinder of all members is impractical; the plaintiffs named will fairly represent and adequately protect the interests of the class; there are common questions of law and fact affecting the several rights; and a common relief is sought.

28. On information and belief, APD intelligence units which have engaged in the illegal and unconstitutional investigation and surveillance of activities which are deemed by defendants and their agents to be appropriate for such scrutiny include the Intelligence Unit, the Directed Investigations (formerly Vice) Unit, the Metro Squad and the Project, which formerly included the Narcotics Unit and was entitled the Regional Organizational Crime Task Force and has now been reorganized and entitled the Repeat Offenders Project (ROP). These units have continued in existence and operation to the present date, whether in the form above described or in some

other permutation unknown to plaintiffs. Defendant Baca, the present police chief, and his predecessors during their respective tenures in that office, were aware of, responsible for and directed, authorized, approved, condoned and acquiesced in all activities of these units.

29. Defendants Baca and Schultz themselves, their agents and their predecessors in office, have utilized the resources of these APD intelligence units for the purpose of illegal and unconstitutional surveillance and investigations of persons and organizations which are political in nature and not grounded in any legitimate basis for law enforcement related background or surveillance activities. On information and belief, there is no constitutional, statutory, city ordinance or other legislative authorization for the existence or operation of these police units within the APD.

30. On information and belief, these police units have worked together with other local, state and federal agencies in every manner and way that is advantageous to the accomplishment of their goals: the investigation of politically related activities in the absence of a legitimate basis for law enforcement related background or surveillance activities.

31. Substantial amounts of money are specially appropriated by the City of Albuquerque for these police units.

32. On information and belief, state and federal funds of various sorts have been used to finance portions of various activities of these police units, including

money from the Law Enforcement Assistance Administration, which was used to create and operate the Intelligence Unit and/or the Project.

33. As officially authorized conduct, either through official sanction or acquiescence in the challenged conduct or through unauthorized conduct by individual police officers engaging in a pattern of harassment against specific targeted persons or organizations constituting a persistent pattern of police misconduct, these investigations and surveillances, in addition to being conducted pursuant to an illegal and unconstitutional grant of authority, have had as the common thread running through such illegal activities, the intent to deter, chill, intimidate, hinder or penalize the persons or organizations so targeted because of the exercise of their constitutional rights and particularly to deter, chill, intimidate, hinder and penalize them from expressing unpopular or dissident political, social, economic, religious or social views about issues of public concern, in violation of protected rights guaranteed by the first, fourth, sixth, ninth and fourteenth amendments to the United States Constitution and under the Constitution of the State of New Mexico.

34. The persons and organizations subject of the above described focused action, including plaintiffs and the plaintiff class, were so targeted because of lawfully held and lawfully expressed political views and other first amendment protected activities, as the subject of illegal surveillance techniques and other impermissible and unconstitutional conduct, have been subjected to and harmed by a policy or practice that systematically violates citizens' rights.

35. In pursuing these illegal and unconstitutional investigations and surveillances, on information and belief, APD intelligence units have engaged and presently continued to engage in all of the following activities as well as other activities unknown to plaintiffs because of the secrecy under which their actions are conducted:

A. Overt physical surveillance by identifiable police officers;

B. Covert physical surveillance by police officers not readily identifiable;

C. Photographic surveillance;

D. Electronic surveillance, both in the form of the tapping of telephone wires and through the placement of electronic and other listening devices, whether legal or unauthorized and therefore illegal;

E. The obtaining and maintenance of information acquired as a result of wiretapping or electronic surveillance conducted by themselves or others;

F. Shadowing, following, tailing individuals and conducting unauthorized searches of the belongings of targeted individuals, including but not limited to use of the method commonly known as "trashing," which is rummaging through personal items contained in trash;

G. Use of paid and unpaid informants;

H. Use of undercover agents, commonly known as persons who assume a false or artificial identity in pursuit of the gathering of information;

I. Use of *agents provocateurs*, persons directed and controlled by police officers of the

intelligence units described above who attempt, through verbal and physical activity, to affect or influence the views and actions of individuals and organizations secretly infiltrated by them;

J. The accumulation of information on hundreds of citizens and organizations from whatever source possible and in whatever manner or means necessary, including use of illegal means by agents of defendants, concerning every aspect of individual or organizational life and history, with emphasis on the political and social views on issues of public concern;

K. Maintenance of thousands of files, dossiers, cards and other written memoranda, the exact number of which is unknown, containing information concerning an unknown number of citizens and organizations possibly numbering in the hundreds. Much of this information has not been obtained and consolidated only from public sources, but has come from private, confidential and otherwise non-public sources as well, both through the use of the above itemized techniques and other techniques not presently known, and much of the information contained in such files is erroneous, false and defamatory, often the result of rumor, innuendo, and bias of informants and other persons providing information;

L. Dissemination of information contained in the files maintained by the intelligence units to each other, to other law enforcement agencies, to any requesting agency of government, and to other government officials and agencies;

M. Dissemination of the information and materials contained in these files to nongovernmental, private individuals and organizations, including news reporters and officials, private corporations and other private individuals and organizations presently unknown to plaintiffs;

N. Seeking to obtain and obtaining the firing, discharge or resignation of employees and officials of various agencies of the defendant City solely on account of information obtained in an intelligence investigation conducted by or on behalf of one or more of the defendants or their agents or on the basis of information in the files obtained by defendants or their agents from others;

O. Threatening to disseminate, or disseminating to the public or individuals or agencies known to be likely to distribute information to the public of various selected information contained in the intelligence files concerning various individuals or organizations with the intent of subjecting them to public scorn, ridicule or danger;

P. Using the information contained in such files and the investigations connected with obtaining such information to cause harm to those investigated;

Q. Conducting for government officials who are not law enforcement officials, based on their authority or financing, investigations of political activities or other activities of citizens and groups perceived by such government officials to be potentially harmful to their own agendas, even though the request was without any legislative or ordinance authority and without any suspicion of any criminal activity;

R. Using computers, data banks, or other information holding, retrieval and transfer systems to obtain, digest, transmit, disseminate and otherwise analyze in various ways some or all of the information obtained by defendants or contained in the filed by them.

36. The conduct described above has been in many instances based on plaintiffs' innocent behavior subjecting them to illegal surveillance activities. In all instances within the scope of the allegations of this Complaint, such conduct has been based on expressive activity neither criminal in nature nor leading to any reasonable conclusion that there is reasonable suspicion or probable cause to believe that such targeted individuals were, are or will be in the future engaged in criminal activity. Defendants' actions and those of their agents have caused and continue to cause a chilling effect on plaintiffs' first amendment association and free expression rights, the effect of which causes harm to plaintiffs beyond subjective fear, including but not limited to injury to personal, political and professional reputations. Such harm further flows from public perception that the maintenance of a police file on any particular individual or organization arises from legitimate police suspicions or beliefs that such individual or organization was, is or may in the future be involved in criminal activity. Such public perception casts upon such individuals and organizations who are the specific targets of impermissible police surveillance activities the shadow and obloquy associated with criminals and the perpetrators of illegal activities.

37. Plaintiffs have no adequate remedy at law to redress the violations of their rights asserted herein. The

past injuries visited upon these plaintiffs and members of the class have continuing, present adverse affects upon them. Defendants' activities constitute a specific present objective harm to plaintiffs as well as the threat of specific future harm as described above. Police conduct which violates, infringes upon and deters expressive activities constitutes a continuing present adverse affect upon persons who are the subject of such impermissible and unconstitutional police activities. The past violation of protected free speech rights imposes a chilling effect on future speech.

38. Unless the relief demanded in this Complaint is granted, plaintiffs' rights of freedom of speech, freedom of press, freedom of assembly, freedom of association, freedom to petition their government for a redress of grievances, freedom to travel, rights to privacy and due process of law protected by the first, fourth, fifth, sixth, ninth and fourteenth amendments to the United States Constitution and sections of the Constitution of the State of New Mexico will continue to be infringed, threatened, impeded, penalized and otherwise interfered with by defendants.

39. The relief sought is essential to prevent interference not only with the rights of the named plaintiffs but also with the rights of the members of the class, many of whom are unknown. The continuing, pervasive and unconstitutional activities of defendants and their agents impose the most serious, immediate and irreparable injury in that plaintiffs and other similarly situated will continue to be hindered and prevented from exercising fully and vigorously their most fundamental constitutional rights.

40. The activities of the APD as alleged above are beyond the scope of its law enforcement functions and without any constitutional or legislative authority. The activities single out persons and groups solely on the basis of their political views and activities and are otherwise arbitrary, unilateral and unsupervised by judicial or legislative authority. In so operating, defendants' activities have served no useful police purpose and have denied plaintiffs and members of their class the rights enumerated above.

41. Defendants and their agents, separately and in concert, acted under color of law, outside the scope of their jurisdiction, and willingly, knowingly and purposely with the specific intent to deprive plaintiffs and members of the class of the above described constitutional rights. The actions of defendants and their agents are shocking to the conscience and offensive to all concepts of fundamental fairness and due process of law.

42. The above described actions and omissions of defendants and their agents are the direct and proximate causes of the injuries complained of by plaintiffs herein. Such injuries have continued to the present and are reasonably likely to continue for the foreseeable future.

43. The threatened and continuing injuries to plaintiffs and members of the class outweigh any perceived harm which a temporary restraining order and/or preliminary injunction may inflict upon defendants. Plaintiffs have a reasonable likelihood of success on the merits. Granting the requested injunctive relief will not disturb the public interest.

44. Upon information and belief, and based upon the past conduct of defendants and their agents in regard to plaintiffs and others, it is reasonably anticipated that a similar investigation of the named plaintiffs and of plaintiffs' present counsel will be conducted in retaliation for the filing of this lawsuit. Such an investigation would be similarly unjustified and would constitute a further deprivation of plaintiffs' constitutional rights as well as those of their counsel. Further, such an investigation might jeopardize plaintiffs' right to counsel of their choice by forcing their counsel into potential witness roles. Thus, plaintiffs and their counsel would both suffer irreparable injury as the result of such an investigation. Plaintiffs and their counsel have no plain, adequate or complete remedy to reduce the effect of such reasonably anticipated wrongs and illegal acts other than by this suit and by the issuance of preliminary and permanent injunctions barring defendants, their employees or agents from conducting any formal or informal investigation of plaintiffs' counsel in connection with their role as counsel for plaintiffs and/or in filing this lawsuit. The threatened injury to plaintiffs outweighs the threatened harm which a temporary restraining order and/or injunction may inflict upon defendants. As is capable of being demonstrated at an evidentiary hearing, plaintiffs have a reasonable likelihood of success on the merits. The granting of the requested injunctive relief will not disturb the public interest. Any other remedy to which plaintiffs and their counsel are entitled would be attended by such uncertainty and delays as to deny substantial relief, cause further irreparable injury and occasion damage and inconvenience to plaintiffs and their counsel.

45. Plaintiffs request that this Court enter an order waiving the requirement of posting bond or other surety in connection with the injunctive relief requested herein.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request the Court grant the following relief:

1. Declaratory judgment that the mandate, from whatever source derived, of the Albuquerque Police Department intelligence units is in violation of the Constitution and laws of the United States and the State of New Mexico.

2. Declaratory judgment that the existence and present or future operation of the intelligence units under the supervision and control of defendants is in violation of the Constitution and laws of the United States and the State of New Mexico.

3. Issuance of a preliminary injunction restraining and prohibiting defendants, their agents, assistants, successors, employees, attorneys and all persons acting in concert or cooperation with them or at their direction or under their control from:

A. All present or future improper, unauthorized, illegal or unconstitutional activities and functions of those intelligence units regardless of the means or agencies through which defendants attempt to carry them out, including all activities alleged herein;

B. Continuing or conducting any further or future background checks or investigations

which are impermissible or unconstitutional and without basis in reasonable suspicion or probable cause to believe any individual or organization was, is or will be engaged in criminal activity, in any manner;

C. Granting access to, distributing, disseminating to any persons, or otherwise making available or use of any confidential police records regarding plaintiffs or any members of the class;

D. Interfering in any manner with the free exercise of first amendment rights by plaintiffs or members of the class including the exercise of such rights by representing persons in criminal prosecutions and/or in actions to vindicate violations of constitutional rights;

E. Subjecting plaintiffs or members of the class to harassment, oppression, threats, intimidation or interference with their relationship with any other persons in any manner; and,

F. Expunging and destroying any files, as that term is used in this Complaint, with reference to the plaintiffs or members of the class, generated and kept as a result of the above described illegal and unconstitutional surveillance activities.

4. For the issuance of a permanent injunction restraining and prohibiting defendants, their agents, assistants, successors, employees, attorneys and all persons acting in concert or cooperation with them or at their direction or under their control from doing any of the acts described in paragraph 3 above.

5. For the issuance of a permanent injunction ordering that all files, dossiers, records, reports, photographs,

recordings, tapes, computer tapes, cards, or other information-bearing material in the custody or control of defendants, their agents, assistants, successors, employees, attorneys and all persons acting in concert or cooperation with them or at their direction or under their control which bear on the lawful political, social, financial or other activities of plaintiffs and members of their class, or which are found otherwise to violate the rights of plaintiffs and members of the class, or which are found to bear no reasonable relationship to the legitimate law enforcement activities of defendants:

A. Be produced before this Court, under appropriate protective order and supervision, for a period of time, with a requirement that the defendants, or a court-appointed monitor at defendants' expense, make all reasonable efforts, as determined by this Court, to notify each person and organization with regard to whom such information is, or has been, collected, maintained, disseminated or used, and allow each person, if desired, to inspect and copy such information; and,

B. At the conclusion of a period of time to be determined by the Court, taking into account any pending proceedings for which some or all of this information may be needed, that all such files, dossiers, records, reports, photographs, recordings, tapes, computer tapes, cards, and other information-bearing material as described in this paragraph 5, together with all copies and reproductions, be publicly destroyed.

6. For the issuance of a permanent injunction restraining and prohibiting defendants, and all persons acting in concert or cooperation with them or at their

direction or under their control from collecting, maintaining, disseminating, or using, any such information and materials, as set out in paragraph 5 of this Prayer for Relief, in the future.

7. For the issuance of preliminary and permanent injunctions barring defendants, their agents, assistants, successors and employees, and all persons acting in concert or cooperation with them or at their direction or under their control from investigating, harassing or retaliating against plaintiffs and plaintiffs' counsel, their witnesses and others participating in the presentation of their claims.

8. For the issuance of a mandatory injunction ordering defendants, in a manner determined appropriate by this Court, to announce the determination of this Court to the public, and, in particular, to those who have been subject to past activities or practices determined by this Court to be unlawful or unconstitutional.

9. For attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and,

10. For such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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(2)

No. 90-1373

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

CITY OF ALBUQUERQUE, et al.

Petitioners,

-vs-

JOSEPH N. RIGGS, III, et al.

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

I. SUPPLEMENT TO PETITIONERS' STATEMENT OF THE CASE

The complaint in this case was pled on information and belief because of the secrecy with which defendants maintained their intelligence files.

Absent any pre-filing discovery, the allegations of the complaint were made consistent with other facts known to the community, including the prior unlawful surveillance by APD Intelligence Unit officers of a well-known civil rights activist and attorney and the information contained in the audit report of former New Mexico Supreme Court Chief Justice William Riordan. According to Justice Riordan's audit report, the impermissibly maintained intelligence files included information acquired and kept for Albuquerque Police Department Intelligence Unit law enforcement officers' personal use and for political purposes with no legitimate law enforcement basis.

No discovery was permitted in the trial court to enable plaintiffs to make any particularized showing of actual harm in support of their complaint. The evidence produced for the district court's consideration supplementary to the allegations of the complaint in response to petitioners' Rule 12(b)(1) Motion to Dismiss for Lack of Standing was entirely information contained in the public record and included a videotape of Justice Riordan's presentation to the Albuquerque City Council in which he gave examples of the nature of the information in the files. Justice Riordan also said that some of the information had been made available by defendants to newspapers and television stations.

The complaint alleged that plaintiffs were the actual targets of defendants' allegedly unlawful surveillance activities and that they were a focus of defendants' continuing conduct, allegations which the United States Court of

Appeals for the Tenth Circuit held made this case "easily distinguishable" from Laird v. Tatum, 408 U.S. 1 (1972), the sole authority on which the district court had relied to dismiss plaintiffs' complaint. Riggs v. City of Albuquerque, 916 F.2d 582, 585 (10th Cir. 1990). In reversing the district court, the Circuit Court further relied upon this Court's ruling in Meese v. Keene, 481 U.S. 465 (1987), that "harm to a plaintiff's reputation in the community is a cognizable injury which affords a plaintiff standing to bring suit." Riggs, 916 F.2d at 585 (emphasis in original), citing Meese, 481 U.S. at 473-74.

Finally, the Circuit Court acknowledged the unique circumstances of this case, in light of the secrecy with which defendants maintained the intelligence files, to excuse plaintiffs from having alleged with more specificity the harm they have suffered from defendants' impermissible conduct. Riggs, 916 F.2d at 586-87, citing Palmer v. City of Chicago, 755 F.2d 560, 573 (7th Cir. 1985).

> As in Palmer, the lack of access to the investigative files in this case prevented plaintiffs from alleging with more specificity that they were targets of the alleged illegal investigations. Dismissal prior to discovery would be inequitable under these facts because plaintiffs have alleged a direct harm caused by defendants' actions.

916 F.2d at 587. Acknowledging the unique circumstances in the allegations of the complaint before it and following the

Seventh Circuit Court of Appeals' reasoning in Palmer, the Circuit Court reversed and remanded to permit discovery.[1]

II. REASONS FOR DENYING THE WRIT

The decision of the United States Court of Appeals for the Tenth Circuit is consistent with standing decisions of this Court and does not conflict with decisions of other circuits. The Circuit Court decision correctly identified the presence in plaintiffs' complaint of sufficient allegations of particularized harm, and further properly recognized in the unusual circumstances of this case "[t]he importance of permitting discovery when crucial information is in the exclusive control of the defendant... ." Riggs, 916 F.2d at 586.

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[1] The Circuit Court was not unmindful of the availability of a Rule 56 summary judgment motion as a means by which defendants might test the sufficiency of plaintiffs' action after discovery has been permitted. Cf., Riggs, 916 F.2d at 586. The practical effect of defendants' deliberate public burning of 34 of the 35 boxes of investigative files which were a subject of this action upon plaintiffs' ability to withstand summary judgment was not addressed by the Circuit Court other than for it to note that the continued existence of the 35th box, and plaintiffs' allegations of defendants' continuing unlawful conduct, forestalled a finding of mootness. Riggs, 916 F.2d at 584, 584 n.2.

A. Plaintiffs' Allegations of Harm to their Personal, Political and Professional Reputations and that They Were the Actual Targets of Unlawful Surveillance Activities Were Sufficient on the Issue of Standing; in the Unusual Circumstances of this Case, the Circuit Court's Ruling Is Not in Conflict With the Decisions of this Court or Other Circuit Courts.

The Circuit Court relied solely upon the allegations of the complaint to find plaintiffs had sufficiently alleged the requisite particularized allegations of fact necessary to support standing to sue. Riggs, 916 F.2d at 584, 584 n.3. The Circuit Court decision is not in conflict with other decisions addressing pleading requirements to support standing. The allegations made by the plaintiffs in United Presbyterian Church in the U.S.A. v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984) were not "nearly identical," as petitioners suggest, Petition, at 8-9, but distinctly different from those alleged in the complaint in this case. In Reagan, plaintiffs alleged a "fear of being subjected to illegal surveillance," and their concern for "the immediate threat of being targeted for surveillance, ..." 738 F.2d at 1377, 1378 (emphasis supplied). Here the allegation is one of focused injury and ongoing conduct. Moreover, in Reagan, the court suggested, in dicta, that "there is no reason why [plaintiffs] would be unable to challenge any illegal surveillance of them when (and if) it occurs," id., at 1380 (emphasis supplied), precisely the factual allegations in the complaint in this case.

In Meese v. Keene, 481 U.S. 465 (1987), this Court found allegations of harm to a plaintiff's reputation to be a sufficiently cognizable injury to afford plaintiff standing to bring suit. Id., at 473-74. Consistent with Meese, the Circuit Court correctly found plaintiffs had alleged in their complaint more than merely a chilling of their first amendment rights, but also "harm to their personal, political, and professional reputations in the community. More importantly, the plaintiffs in this case alleged that they were the actual targets of the illegal investigations. Thus, Laird is easily distinguishable... ." Riggs, 916 F.2d at 585 (emphasis supplied).

The Circuit Court properly applied the teachings of this Court to find that the allegations of the complaint, taken as true and construed in favor of the plaintiffs on a motion to dismiss for lack of standing, see, Pennell v. City of San Jose, 485 U.S. 1, 7 (1988), sufficiently alleged injury in fact and therefore presented a justiciable case or controversy for adjudication in the federal district court.

B. Where Crucial Information is Solely in the Hands of Defendants, the Decision of the United States Court of Appeals for the Tenth Circuit to Permit Discovery Does Not Conflict With Other Circuit Courts' Decisions; Because the Factual Allegations in Plaintiffs' Complaint Markedly Differ from Complaints in Other Cases, and the Rulings of the Respective Circuit Courts are Fact Specific, no Conflict Between the Circuit Courts' Decisions Exists.

In seeking to manufacture a conflict between the Circuit Court's decision below and rulings in other Circuit Courts

and in this Court, petitioners fail to acknowledge the unusual circumstances in this case where "crucial information is in the exclusive control of the defendant," Riggs, 916 F.2d at 586, and where the district court's dismissal of the complaint came without permitting plaintiffs any discovery. Haase v. Sessions, 835 F.2d 902 (D.C. Cir. 1987), on which petitioners rely, was specifically discussed by the Circuit Court, which acknowledged that in other circumstances, discovery might not be required on the standing issue, but that here, on a motion to dismiss and not at summary judgment, discovery was "particularly appropriate."[2] Riggs, 916 F.2d at 586. Because of the unusual facts alleged in plaintiffs' complaint, the Circuit Court's ruling is not in conflict with other circuits or with this Court.

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[2] The other cases petitioners cite were ruled on at a later stage than a motion to dismiss, cf., Sinclair v. Schriber, 916 F.2d 1109 (6th Cir. 1990) (summary judgment); Wade v. Goodwin, 843 F.2d 1150 (8th Cir.) cert. denied, 488 U.S. 854 (1988) (same); Haase v. Sessions, 835 F.2d 902 (D.C. Cir. 1987); Fifth Avenue Peace Parade Committee v. Gray, 480 F.2d 326 (2d Cir. 1973), cert. denied, 415 U.S. 948 (1974) (ruling following non-jury trial), or involved circumstances factually different than those alleged here, i.e., no claim as to the existence of defendants' secret activities precluding more specific pleading, Haase, supra; Olagues v. Russoniello, 797 F.2d 1511 (9th Cir. 1986), vacated as moot 484 U.S. 806 (1987), or no claim of injury in fact or ongoing unlawful conduct. United Presbyterian Church in the U.S.A. v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984) (action based on mere fear of surveillance and speculative threat of injury).

The Circuit Court's ruling is in harmony with the decisions in two other circuits, one of which the Circuit Court relied on in making its decision and neither of which petitioners bring to this Court's attention in seeking a writ of certiorari. The Circuit Court quoted extensively from Palmer v. City of Chicago, 755 F.2d 560, 573 (7th Cir. 1985), in underscoring the importance of discovery "when crucial information is in the exclusive control of the defendants... ." Riggs, 916 F.2d at 586.[3] The Second Circuit Court of Appeals has recently addressed similar issues, rejecting defendants' attack on plaintiffs' standing to sue in light of the secrecy of defendants' activities. New York State National Organization for Women v. Terry, 886 F.2d 1339, 1348 (2d Cir. 1989).

The Tenth Circuit does not stand alone, but is in harmony with the other two circuit courts which have addressed issues of standing in circumstances like these where the secrecy of defendants' activities and defendants' exclusive possession of the information essential in proving the injury prevents more specific pleading in advance of discovery.

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[3] The Circuit Court's reliance on Palmer is in harmony with this Court's recognition in Warth v. Seldin, 422 U.S. 490, 501-02 (1975) requiring that plaintiffs have the opportunity to make the requisite allegations required to support standing to sue. Compare, Warth v. Seldin, supra with Palmer, 755 F.2d at 573, quoted in Riggs, 916 F.2d at 586-87. See also, Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 451 (6th Cir. 1988).

CONCLUSION

Public policy does not justify granting petitioners' request for a writ of certiorari. Together with the Second and Seventh Circuits, the Tenth Circuit recognizes the inequity of barring discovery where defendants' secret activities makes more specific pleading impossible.

Plaintiffs do not seek "intrusive discovery into the operations of a police agency," Petition, at 9, but the opportunity, after discovery, to secure declaratory and injunctive relief based on the unlawful surveillance activities of a police intelligence unit engaged in conduct that has no legitimate law enforcement purpose.[4]

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[4] The relief plaintiffs sought in their Complaint was not new or novel in the context of "Red Squad" cases such as this one, but was patterned after relief successfully obtained in other cases attacking impermissible political surveillance activities conducted by local and national law enforcement agencies. See, Chevigny, Politics and Law in the Control of Local Surveillance, 69 Cornell L. Rev. 735, 747-67 (New York, Chicago and Memphis), 767-77 (Los Angeles, Michigan and Detroit) (1984). Cf., Alliance to End Repression v. City of Chicago, 91 F.R.D. 182 (N.D. Ill. 1981) (FBI); Alliance to End Repression v. City of Chicago, 561 F. Supp. 537 (N.D. Ill. 1982), rev'd on other grounds, 742 F.2d 1007 (7th Cir. 1984) (Chicago Police Department); Handschu v. Special Services Division, 605 F. Supp. 1384, 1417-24 (S.D.N.Y. 1985), aff'd, 787 F.2d 828 (2d Cir. 1986) (New York City Police Department).

The Petition for a Writ of Certiorari should be denied.

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